

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MATTHEW G. STORRER

Claimant

VS.

T.L.C. COURIERS, INC.

Respondent

AND

KANSAS WORKERS COMPENSATION FUND

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Docket No. 1,019,693

ORDER

Claimant appeals the January 31, 2005 preliminary hearing Order of Administrative Law Judge Bruce E. Moore. Claimant was denied benefits after the Administrative Law Judge (ALJ) determined that claimant had failed to prove that he suffered personal injury by accident arising out of and in the course of his employment, finding that the relationship between claimant and respondent was one of principal-contractor, rather than employer-employee.

ISSUES

1. Was claimant an employee of respondent on the date of the alleged accident for the purposes of coverage under the Workers Compensation Act?
2. Did claimant suffer accidental injury arising out of and in the course of his employment?
3. Is claimant entitled to medical benefits and temporary total disability compensation?
4. What is claimant's average weekly wage?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

For the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed.

Claimant was hired in December of 2003 to drive as a courier for T.L.C. Couriers, Inc. (TLC) after answering a newspaper ad. Claimant contacted the employer and spoke to Brian Holder, the operations manager, and Debbie Carriker, a TLC employee. Claimant then met Ms. Carriker the next day and followed her over a carrier route, visiting various banks where claimant would be picking up materials and delivering them to other banks and to the home office in Salina, Kansas. Claimant began working the following day, running as a carrier on the route. The only document signed by claimant in conjunction with this relationship was a lease owner-operator agreement, which allowed claimant to lease his car to the employer for the purposes of utilizing it during the pickup and delivery of the various banking documents. Claimant was responsible for supplying the car and all maintenance items, including oil changes, gasoline, tires and automobile insurance. Respondent, on the other hand, provided only liability and cargo insurance, as is required by the Kansas Corporation Commission. Claimant would drive to Delphos, Kansas, where his job started, and then make a series of pickups and deliveries to various banking institutions on his route. Claimant requested a route description that he could follow in order to contact the banks on his delivery route in the most expeditious manner. Claimant also was provided a TLC route log, which noted the arrival and departure time at each pickup location, including the address of the banks where he was to perform the pickup and delivery services. This route log would then be turned in to the employer on a weekly basis. Claimant was paid \$450 lump sum bi-weekly. Respondent took out no employment taxes and provided no W-2 to claimant. A 1099 was, however, provided to claimant by respondent. Claimant was also required to deduct all of his expenses from the \$450 lump sum payment check. That check amount was determined by the number of stops claimant made at the local banks.

Claimant testified that this was a part-time job, requiring only about three hours of his day. Claimant was free to obtain other employment or to arrange other stops, so long as the times were cleared with the employer.

The routing times on claimant's route had been designated by earlier carriers, who would contact the banks and make arrangements as to the appropriate time for the pickups to occur.

Claimant was driving on his route on September 17, 2004, when the right tire of his vehicle went off the side of the road. Claimant overcorrected, resulting in an automobile accident. Claimant suffered significant back injuries, undergoing back surgery in Wichita, Kansas. He wore a back brace for a period of time after the surgery, but ultimately was

returned to work with a 20-pound lifting limit. Claimant testified that in his opinion, the job with respondent could be performed while staying within the 20-pound limitation.

There was no application signed by claimant when he contracted to do the route for the employer. Claimant testified that the only time an independent contractor relationship was mentioned was during one of his conversations with Ms. Carriker in relation to the fact that the employer would not deduct any taxes from his paycheck. However, Brian Holder, the operations manager for the employer, testified that he also discussed with claimant claimant's status as an independent contractor at the time of claimant's hire. Mr. Holder testified he only spoke to claimant on one occasion, a fact which claimant verified. However, claimant did not testify to having discussed the independent contractor relationship with Mr. Holder.

Both Mr. Holder and Dianne Kaaz, a contract driver for respondent, testified that the drivers were independent. They were allowed to pick up additional work if they were able to, with Ms. Kaaz testifying that on at least one occasion she had added a route stop to her particular route which went through Colby, Kansas, to Denver, Colorado, and then returned to Salina. Ms. Kaaz testified that the utilization of the route log was for the purpose of being able to verify the time and date of a particular pickup, should one of the banks encounter missing banking documents. She testified that the transporting of the checks and the ability to verify the pickup and delivery of the various documents was a significant issue in this contact situation. Thus, the utilization of the log, in her mind, was significant.

While claimant was provided a route to follow, both Mr. Holder and Ms. Kaaz testified that claimant and any of the carriers were free to vary the route should circumstances require. Ms. Kaaz testified specifically to road construction and weather concerns as being possible reasons for variations in the route. Additionally, if the drivers were able to uncover a more efficient route, they were allowed to vary their route, so long as they arrived at the pickup spot at the various banks on time.

Claimant contends he is an employee of respondent, with respondent contending claimant was an independent contractor for the purposes of the Kansas Workers Compensation Act.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.¹

¹ K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

It is often difficult to determine in a given case whether a person is an employee or an independent contractor because there are, in many instances, elements pertaining to both relationships that may occur without being determinative of the actual relationship.²

There is no absolute rule for determining whether an individual is an independent contractor or an employee.³

The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.⁴

The test primarily used by the courts in determining whether the employer-employee relationship exists is whether the employer had the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.⁵

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

- (1) The existence of a contract to perform a piece of work at a fixed price.
- (2) The independent nature of the worker's business or distinct calling.
- (3) The employment of assistants and the right to supervise their activities.
- (4) The worker's obligation to furnish tools, supplies and materials.
- (5) The worker's right to control the progress of the work.
- (6) The length of time the employee is employed.

² *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

³ *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

⁴ *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

⁵ *Wallis* at 102 & 103.

(7) Whether the worker is paid by time or by job.

(8) Whether the work is part of the regular business of the employer.⁶

In this instance, the only contract entered into between the parties dealt with the lease of claimant's vehicle to the employer for the purpose of pickup and delivery of the bank documents. Claimant was paid a lump sum payment and was responsible for providing all the maintenance on his vehicle, including gasoline, tires and oil changes, as well as regular automobile insurance. The only control on claimant was that he had to be at a particular bank at a particular time in order to make the appropriate pickup. Finally, both claimant and Ms. Kaaz agreed that they were allowed by their arrangement with the employer to hire substitute drivers. They would then be responsible for paying those drivers for the pickup and delivery services provided, with no payments to the substitute drivers coming from the employer.

The Board, in considering all of the factors, has concluded that claimant's relationship with respondent was that of an independent contractor and not an employee. The ALJ's determination that claimant is not entitled to benefits as a result of that relationship is, therefore, affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Bruce E. Moore dated January 31, 2005, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 2005.

BOARD MEMBER

c: Rodney G. Nitz, Attorney for Claimant
Darin M. Conklin, Attorney for Respondent
Norman R. Kelly, Attorney for the Fund
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁶ *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).